



DAN MORALES  
ATTORNEY GENERAL

Office of the Attorney General  
State of Texas

September 24, 1991

Mr. Richard D. Monroe  
Office of General Counsel  
State Department of Highways and  
Public Transportation  
125 East 11th Street  
Austin, Texas 78701-2483

OR91-423

Dear Mr. Monroe:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 13432.

You have received a request for "[a]ll records of protocols, criteria, instructions, application, bids, bid supplementation or appendices, internal memoranda, external written communications and all other documentation generated or received by the [State Department of Highways and Public Transportation] in reference to the Oil Overcharge Program - Park and Ride and Activities Applications for FY 1991." *See generally* V.T.C.S. art. 4413(56) (Oil Overcharge Restitutionary Act). You submitted to us for our review "Program Scoring Sheets" and a memorandum dated July 17, 1991. In subsequent correspondence to this office, you submitted additional memoranda and notes relating to the bid proposals. You claim that the requested information is excepted from required public disclosure by sections 3(a)(4) and 3(a)(11) of the Open Records Act.

Section 3(a)(4) excepts from required public disclosure "information which, if released, would give advantage to competitors or bidders." The purpose of section 3(a)(4) is to protect governmental interests in commercial transactions. Open Records Decision No. 593 (1991) at 2. It has most often been applied to competitive bidding situations prior to the award of a contract. *See, e.g.*, Open Records Decision Nos. 541 (1990) at 4-5; 331 (1982); 232 (1979); 75 (1975). The governmental body must demonstrate the possibility of some specific harm in a particular competitive situation. Open Records Decision No. 593.

You contend that disclosure of the "Program Scoring Sheets"<sup>1</sup> would give future grant applicants a detailed knowledge of ranking methods of the State Department of Highways and Public Transportation (hereinafter "the department") in evaluating grant applications. You further contend that future applicants would draft grant applications to fit within the scoring sheet categories, resulting in nonviable grant proposals and the misapplication of state funds.

The Park and Ride program is a competitive grant program. V.T.C.S. art. 4413(56), § 26. Even assuming that section 3(a)(4) applies to program scoring sheets, *see generally* Open Records Decision Nos. 331 (1982); 124 (1975), it appears from the records that the competition has come to an end and the department has made its decision about the grant applicants. In the usual case, the protection of section 3(a)(4) comes to an end when the specific competitive process ends, so that this section would not protect materials relating to the evaluation of bids. *See* Open Records Decision No. 232 (1979); *cf.* Open Records Decision Nos. 331 (1982); 171 (1977).

You have not shown how disclosure of the department's ranking methods would interfere with the competitive process for grants in the future, nor is this apparent from the face of the documents. An allegation of a remote possibility that an unknown competitor might gain some unspecified advantage from disclosure is not sufficient to invoke section 3(a)(4). Open Records Decision No. 463 (1987). The department has not made a sufficient showing of competitive harm. Accordingly, the "Program Scoring Sheets" may not be withheld under section 3(a)(4).

You claim that the memoranda dated May 9, 1991, June 6, 1991, and July 17, 1991, handwritten notes relating to the latter memorandum, and draft memoranda dated July 16, 1991, are excepted from required public disclosure by section 3(a)(11). Section 3(a)(11) excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the governmental entity's policy making or deliberative process. Open Records Decision No. 462 (1987). Facts and written observation of facts, when such information is severable from advice, opinion, or recommendation,

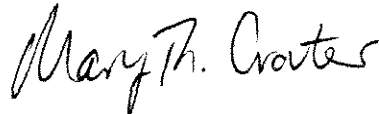
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<sup>1</sup>These sheets list the criteria used by the department in evaluating applications as well as the scores of particular applicants.

cannot be withheld under section 3(a)(11). *See generally* Open Records Decision No. 213 (1978). These materials contain protected advice, opinion, and recommendation, as well as information not excepted by section 3(a)(11). For your convenience, we have marked the information that may be excepted from required public disclosure by section 3(a)(11). The May 9, 1991 memorandum, the handwritten notes, and the July 16, 1991 draft memoranda may be withheld in their entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-423.

Yours very truly,



Mary R. Crouter  
Assistant Attorney General  
Opinion Committee

MC/GK/mc

Enclosures: Returned Documents

Ref.: ID#s 13432, 13433

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